

## **EXHIBIT 3**

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ENDORSED  
 FILED  
 San Francisco County Superior Court

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SUPERIOR COURT OF CALIFORNIA  
 COUNTY OF SAN FRANCISCO  
 UNLIMITED JURISDICTION

TRAVIS ABNER, JAMES GILL,  
 RICHARD MESQUITA, HARRY  
 BARSKY, PETER CASARINO, JOAN  
 KELLY, RICHARD JONES, NOEL  
 HARRISON, PAULINE SPIKER, JOAN  
 MARY KELLEY, THOMAS JOSEPH  
 COCO, JOHN ROBERTS, LAWRENCE  
 BULLOCK, and CHARLES URBAN,  
 individually and on behalf of themselves  
 and all others similarly situated,  
 TRAVIS ABNER, JAMES GILL,  
 RICHARD MESQUITA, on behalf of  
 themselves and the California General  
 Public,

Plaintiffs,  
 vs.

W.R. GRACE & COMPANY; W.R.  
 GRACE CO.-CONN; GRACE  
 HOLDINGS, INC; GRACE SPECIALTY  
 CHEMICALS, INC.; MERRILL LYNCH,  
 PIERCE, FENNER & SMITH INC.;  
 CREDIT SUISSE FIRST BOSTON  
 CORP.; SEALED AIR CORPORATION  
 (US); NATIONAL MEDICAL CARE,  
 INC.; FRESENIUS U.S.A., INC.;  
 FRESENIUS MEDICAL CARE, INC.;  
 FRESENIUS NATIONAL MEDICAL  
 CARE, INC.; and DOES 1-100,

Defendants.

GENERAL CIVIL CASE

No. 315465

FIRST AMENDED CLASS ACTION  
 COMPLAINT FOR VIOLATIONS OF:

- 1) THE UNIFORM FRAUDULENT  
 TRANSFER ACT AND COMMON  
 LAW OF FRAUDULENT  
 CONVEYANCE
- 2) CIVIL CONSPIRACY
- 3) UNFAIR BUSINESS PRACTICES:  
 BROUGHT ON BEHALF OF THE  
 GENERAL PUBLIC

JURY DEMAND

1 Plaintiffs Travis Abner, James Gill, Richard Mesquita, Harry Barsky, Peter  
 2 Casarino, Joan Kelley, Richard Jones, Noel Harrison, Pauline Spiker, Joan Mary Kelley,  
 3 Thomas Joseph Coco, John Roberts, Lawrence Bullock, and Charles Urban, on behalf of  
 4 themselves and a national class of similarly situated people, bring this action against Merrill  
 5 Lynch, Pierce, Fenner & Smith, Credit Suisse First Boston Corporation, W. R. Grace &  
 6 Co., Inc., W. R. Grace & Co.-Conn., Inc., Grace Holdings, Inc., Grace Specialty  
 7 Chemicals, Inc., National Medical Care, Inc., Fresenius U.S.A., Inc., Fresenius Medical  
 8 Care, Inc., Fresenius National Medical Care, Inc., Sealed Air Corporation (US), and DOES  
 9 defendants 1-100 ("Defendants").

10 Plaintiffs James Gill, Richard Mesquita, and Travis Abner, on behalf of  
 11 themselves and on behalf of the California general public bring this action in a representative  
 12 capacity under California Business and Professions Code Section 17200 against the  
 13 Defendants. The Plaintiffs allege the following factual and legal allegations upon information  
 14 and belief. Paragraphs pertaining to Plaintiffs' own actions, however, are alleged upon  
 15 personal knowledge.

## 16 INTRODUCTION AND OVERVIEW

17  
 18 1. This case arises from W.R. Grace & Co., Inc.'s ("Grace") efforts to  
 19 shield itself from tort claims arising from its asbestos liability.

20 2. The Plaintiffs represent the tens of thousands of people with unsatisfied  
 21 personal injury or wrongful death claims against Grace and its affiliates based upon exposure  
 22 to asbestos. Plaintiffs are creditors of Grace and its former subsidiary W.R. Grace & Co.-  
 23 Conn.

24 3. Grace and its predecessors and certain subsidiaries manufactured and  
 25 sold asbestos products. Those products have been responsible for severe personal injuries and  
 26 tens of thousands of deaths. As a result, Grace is now the defendant in over 40,000 lawsuits  
 27 filed by individuals and survivors of individuals exposed to its asbestos products. Thousands  
 28 of those lawsuits are pending in the State of California.

1           4.     In September of 1996 and again in March of 1998, Grace entered into a  
2 complex series of transactions with the intention and effect of fraudulently transferring and  
3 conveying valuable assets to Defendants as herein alleged. In September of 1996, Grace  
4 Specialty Chemicals Inc. spun off its packaging and specialty chemicals businesses—and its  
5 asbestos liabilities to the Class—but first stripped away and segregated out its medical care  
6 company. The spun-off company was called W.R. Grace & Co., and the medical care  
7 business was merged with and into a German company, Fresenius Medical Care AG. The  
8 series of transactions rendered Grace unable to pay its future debts as they matured (including  
9 its asbestos liability), and constituted a fraudulent transfer and conveyance.

10           5.     In March of 1998, Grace perpetrated a similarly structured fraudulent  
11 transfer and conveyance. This transaction consisted of Grace merging its Cryovac packaging  
12 business (with sales of \$1.83 billion in 1997) with Sealed Air Corporation in a transaction  
13 valued at over \$6 billion. This transaction resulted in Grace shareholders owning  
14 approximately 63% of Sealed Air Corp. This series of transactions rendered Grace insolvent,  
15 unable to pay its debts as they matured, and constituted a fraudulent transfer and conveyance.

16           6.     Plaintiffs seek damages, a constructive trust, a judicial declaration that  
17 Defendants—to which Grace fraudulently transferred assets—are responsible for the asbestos  
18 liabilities of Grace and W.R. Grace & Co.-Conn, and judgment against all Defendants for  
19 their role in fraudulently transferring valuable assets of Grace and W.R. Grace & Co.-Conn.  
20 to themselves and to other entities.

#### 21 22                               JURISDICTION AND VENUE

23           7.     All Defendants are subject to the jurisdiction of the courts of the State  
24 of California by virtue of their business dealings and transactions in California and by causing  
25 an injurious effect in California through their fraudulent conveyances.

26           8.     This Court has jurisdiction over each Defendant named herein because  
27 each defendant is a corporation doing sufficient business in California, and having sufficient  
28 minimum contacts with California or otherwise intentionally availing itself of the California

1 market through the manufacture, production, promotion, sale, marketing and distribution of  
2 its products in California, to render the exercise of jurisdiction by the California courts  
3 permissible.

4 9. Venue is proper because some of the Class Members' property that was  
5 fraudulently conveyed is found in this county and Class Members within this County were  
6 damaged by Defendants' acts. In addition, at least one of the plaintiffs resides in this County  
7 and his claim arose in this County.

8  
9 PARTIES

10 10. Plaintiff Richard Mesquita is a resident of Castro Valley, California.  
11 He either has personal injury claims pending as a representative against Grace arising from  
12 exposure to asbestos products or has personal injuries arising from exposure to asbestos  
13 products and as such is a creditor of Grace.

14 11. Plaintiff James Gill is a San Francisco resident. He either has personal  
15 injury claims pending as a representative against Grace arising from exposure to asbestos  
16 products or has personal injuries arising from exposure to asbestos products and as such is a  
17 creditor of Grace.

18 12. Plaintiff Travis Abner is an Oakland resident. He either has personal  
19 injury claims pending as a representative against Grace arising from exposure to asbestos  
20 products or has personal injuries arising from exposure to asbestos products and as such is a  
21 creditor of Grace.

22 13. Plaintiff Harry Barsky is a resident of Newark, Delaware. He either  
23 has personal injury claims pending as a representative against Grace arising from exposure to  
24 asbestos products or has personal injuries arising from exposure to asbestos products and as  
25 such is a creditor of Grace.

26 14. Plaintiff Peter Casarino is a resident of Newark, Delaware. He either  
27 has personal injury claims pending as a representative against Grace arising from exposure to  
28

1 asbestos products or has personal injuries arising from exposure to asbestos products and as  
2 such is a creditor of Grace.

3 15. Plaintiff Joan Kelly is a resident of Hudson Falls, New York. She has  
4 personal injury claims pending as representative of Phillip LeGrand Kelly against Grace  
5 arising from exposure to asbestos products and as such is a creditor of Grace.

6 16. Plaintiff Richard Jones is a resident of Lancaster, California. He has  
7 personal injury claims pending as representative of Johnny Morris Jones against Grace arising  
8 from exposure to asbestos products and as such is a creditor of Grace.

9 17. Plaintiff Noel Harrison is a resident of Palmdale, California. He has  
10 personal injury claims pending against Grace arising from exposure to asbestos products and  
11 as such is a creditor of Grace.

12 18. Plaintiff Pauline Spiker is a resident of Los Angeles, California. She  
13 has personal injury claims pending as a representative of Harold Spiker against Grace arising  
14 from exposure to asbestos products and as such is a creditor of Grace.

15 19. Plaintiff Joan Mary Kelley is a resident of Hudson Falls, New York.  
16 She either has personal injury claims pending as a representative against Grace arising from  
17 exposure to asbestos products and as such is a creditor of Grace.

18 20. Plaintiff Thomas Joseph Coco is a resident of Staten Island, New York.  
19 He either has personal injury claims pending as a representative against Grace arising from  
20 exposure to asbestos products or has personal injuries arising from exposure to asbestos  
21 products and as such is a creditor of Grace.

22 21. Plaintiff John Roberts is a resident of Staten Island, New York. He  
23 either has personal injury claims pending as a representative against Grace arising from  
24 exposure to asbestos products or has personal injuries arising from exposure to asbestos  
25 products and as such is a creditor of Grace.

26 22. Plaintiff Lawrence Bullock is a resident of Bridgeport, Connecticut.  
27 He either has personal injury claims pending as a representative against Grace arising from  
28

1 exposure to asbestos products or has personal injuries arising from exposure to asbestos  
2 products and as such is a creditor of Grace.

3 23. Plaintiff Charles Urban is a resident of East Haddam, Connecticut. He  
4 either has personal injury claims pending as a representative against Grace arising from  
5 exposure to asbestos products or has personal injuries arising from exposure to asbestos  
6 products and as such is a creditor of Grace.

7 24. Defendant W.R. Grace & Co. is a Delaware corporation, and is  
8 headquartered on 7500 Grace Drive in Columbia, MD 21044.

9 25. Defendant Merrill Lynch, Pierce, Fenner & Smith Incorporated  
10 ("Merrill Lynch") is a Delaware corporation that has its global headquarters at the World  
11 Financial Center, North Tower, 250 Vesey Street, New York City, New York 10281.  
12 Merrill Lynch is one of the world's largest and most profitable investment banks in the  
13 world.

14 26. Defendant W.R. Grace & Co.-Conn. ("Grace-Conn.") is a Connecticut  
15 corporation that is headquartered on 1750 Clint Moore Rd., Boca Raton, Florida 33487.

16 27. Defendant Credit Suisse First Boston Corporation ("First Boston") is a  
17 Massachusetts corporation located at Park Avenue Plaza, 55 East 52nd Street, New York,  
18 New York 10055. First Boston is among the largest investment banks in the world.

19 28. Sealed Air Corporation ("Sealed Air") is a Delaware Corporation that  
20 is located at Park 80 East, Saddle Brook, New Jersey.

21 29. Defendant Grace Holdings, Inc. is Delaware corporation that is  
22 headquartered on One Town Center Rd., in Boca Raton, Florida. It was a subsidiary of  
23 W.R. Grace & Co.

24 30. Grace Specialty Chemicals, Inc., renamed as W.R. Grace & Co., was  
25 a Delaware Corporation with its principal place of business at One Town Center Rd., in Boca  
26 Raton, Florida 33486-1010.

27 31. Defendant National Medical Care, Inc. is a New York corporation with  
28 its corporate headquarters located at 1601 Trapelo Rd., in Waltham, Massachusetts.

1           32. Defendant Fresenius U.S.A., Inc. is a Delaware corporation with its  
2 corporate headquarters located at 2637 Shadelands Dr., Walnut Creek, California 94598.

3           33. Defendant Fresenius Medical Care, A.G. is a German Corporation with  
4 its principal place of business at Gluckensteinweg 5, 61343 Bad Homburg, Germany.

5           34. Defendant Fresenius National Medical Care, Inc. is the name of the  
6 reorganized entity created through the fraudulent conveyances described herein.

7           35. Defendants Does 1 through 100, inclusive, are sued herein under  
8 fictitious names. Their true names and capacities are unknown to Plaintiffs. When their true  
9 names and capacities are ascertained, Plaintiffs will amend this complaint by inserting their  
10 true names and capacities herein. Plaintiffs is informed and believes and thereon alleges, that  
11 each of the fictitiously named defendants is responsible in some manner for the occurrences  
12 herein alleged, and that his damages as herein alleged were proximately caused by those  
13 defendants.

14  
15                                   CLASS ACTION ALLEGATIONS

16           36. The Plaintiffs bring this class action under California Code of Civil  
17 Procedure Section 382, on behalf of themselves and as representatives of a Class consisting  
18 of:

19                   **“All persons who presently have lawsuits on file in the**  
20                   **United States that are pursuing unsatisfied personal injury**  
21                   **or wrongful death claims against any of the Defendants**  
22                   **based on or relating to asbestos exposure.”**

23           37. The questions of law and fact common to the Plaintiffs and the Class  
24 Members are substantially similar and predominate over the questions affecting the individual  
25 members. Among the questions of law and fact common to the Plaintiffs and the Class are  
26 the following:

- 27                   a. Whether Grace fraudulently conveyed assets in violation of the  
28                   Uniform Fraudulent Transfer Act;

- 1 b. Whether Grace fraudulently conveyed assets in violation of the
- 2 common law of fraudulent conveyance;
- 3 c. Whether the Defendants conspired to fraudulently transfer assets in
- 4 violation of Plaintiffs' and Class members' rights;
- 5 d. Whether Grace received a reasonably equivalent value in exchange
- 6 for the assets it transferred;
- 7 e. Whether Grace was engaged or was about to be engaged in business
- 8 in which its remaining assets after the transfer were unreasonably
- 9 small;
- 10 f. Whether Grace intended to incur or reasonably believed it would
- 11 incur debts beyond its ability to pay as they become due; and
- 12 g. Whether Grace made the transfers as herein alleged with actual
- 13 intent to hinder, delay or defraud the Plaintiffs and the Class
- 14 Members;
- 15 h. Whether the transfers should be set aside and declared invalid and
- 16 the transferees enjoined to return the assets transferred; and
- 17 i. Whether the Defendants should be subject to a money judgment for
- 18 restitution for the value of any assets transferred, for any profits,
- 19 derived from the fraudulently transferred assets and for the
- 20 expenses in carrying out the transfers.

21 38. The claims of the Plaintiffs are typical of the claims of the Class  
22 Members.

23 39. The named Plaintiffs will fairly and adequately protect the interests of  
24 the Class they represent and do not have any interests antagonistic to those of the other  
25 members of the Class.

26 40. The Plaintiffs have retained counsel who are competent and  
27 experienced in the prosecution of class action litigation.  
28

1           41. A class action is superior to other available methods for the fair and  
2 efficient adjudication of this controversy. The expense and burden of individual litigation  
3 make it impracticable for the Class Members individually to seek redress for the wrongful  
4 conduct alleged herein. If class treatment of these claims were not available, Defendants  
5 would likely unfairly profit from their fraudulent transfer or otherwise escape liability.

6  
7                                   **FACTUAL ALLEGATIONS**

8           42. Experts estimate that at least 21 million American workers have been  
9 exposed to "significant" amounts of asbestos at the workplace since 1940. Millions others  
10 have been exposed through environmental contact or contact with relatives who have worked  
11 with the products. Because of its injurious propensities, such exposure, in human terms, has  
12 meant that literally tens of thousands of people fall ill or die from asbestos-related diseases  
13 every year. In legal terms, it has translated into hundreds of thousands of lawsuits centered  
14 mainly in industrialized areas along the country's coasts, including California.

15           43. Asbestos litigation has been on going for four decades and as a result of  
16 this litigation numerous companies have been forced into bankruptcy. Raymark Industries,  
17 Forty-Eight Insulations, Unarco, Standard Asbestos, Johns-Manville Corporation, Eagle-  
18 Picher Industries, and Celotex Corporation, just to name a few, all have at one point declared  
19 bankruptcy due to asbestos liability.

20           44. On September 30, 1996, Grace and Fresenius AG completed a series of  
21 transactions that resulted in the creation of two new business entities. First, Grace spun off to  
22 its common shareholders a "new" Grace comprised of Grace's packaging and specialty  
23 chemicals businesses. Second, Grace's former health care subsidiary, National Medical Care,  
24 Inc. ("NMC") was combined with the worldwide dialysis business of Fresenius AG to form a  
25 new company named Fresenius Medical Care AG.

26           45. As a result of these transactions, Grace's common shareholders  
27 received 100% of a "new" W. R. Grace & Co. focused on its packaging and specialty  
28 chemicals businesses. "Old" W. R. Grace & Co. common shareholders also received 44.8%

1 of a newly created health care company, Fresenius Medical Care AG, the world's largest  
2 fully integrated renal care company.

3 46. On March 31, 1998, the "new" Grace and Sealed Air Corporation  
4 completed a series of transactions that resulted in the creation of two new companies. First,  
5 Grace spun off to its shareholders a second "new" W. R. Grace & Co., comprised of Grace's  
6 specialty chemicals businesses. Second, W. R. Grace & Co.'s Cryovac flexible packaging  
7 business was combined with Sealed Air, to form the world's leading protective and specialty  
8 packaging company. Numerous valuable assets were transferred to Sealed Air and/or related  
9 companies.

10 47. Valued by the market at more than \$6 billion, these 1998 transactions  
11 provide substantial value to Grace's shareholders, who received 100% of the second "new"  
12 W. R. Grace & Co., a premier global specialty chemicals company, and also received  
13 common and preferred stock representing approximately 63% of the "new" Sealed Air, the  
14 company combining Grace's former Cryovac business with Sealed Air's protective packaging  
15 business.

16 A. The 1996 Fraudulent Transfer.

17 48. On February 4, 1996, the Grace and Fresenius AG signed an  
18 Agreement and Plan of Reorganization and other related agreements. Grace engaged First  
19 Boston and Merrill Lynch to act as its financial advisors in connection with Grace's  
20 exploration of how to strip out and segregate NMC and other good assets from Grace's  
21 specialty chemicals business and asbestos exposure, thus leaving Grace without sufficient  
22 capital to pay its asbestos victims and creditors.

23 49. First Boston and Merrill Lynch counseled, advised, guided, schemed,  
24 conspired, and strategized with Grace to accomplish this goal. First Boston and Merrill  
25 Lynch each delivered to Grace's board a short "fairness opinion" opining that the 1996  
26 transaction was fair "from a financial point of view." But, as reflected in a Form S-4 filed  
27 with the Securities and Exchange Commission ("SEC"), First Boston and Merrill Lynch each  
28 expressly assumed away the critical issue—whether the 1996 transactions would comply with

1 applicable U.S., foreign, federal and state laws including laws relating to fraudulent  
2 conveyance, fraudulent transfer, and other similar laws affecting creditors' rights. As  
3 explained in the Form S-4, this was done with Grace's consent.

4 50. In exchange for their financial advisory services and fairness opinions,  
5 First Boston and Merrill Lynch each received fees of between approximately \$8.5 million and  
6 \$9.4 million, expenses, and received indemnification against certain liabilities in connection  
7 with their engagement. In addition, First Boston and Merrill Lynch each reserved the right  
8 actively to trade and profit in the debt and securities of Grace and the Fresenius entities.

9 51. Briefly stated, the September 28 and 29, 1996 transactions unfolded as  
10 follows:

- 11 • Before the transactions, NMC was a wholly owned subsidiary of  
12 Grace-Conn. (Grace Chemicals), which in turn was a wholly owned subsidiary of the parent  
13 company Grace;
- 14 • Grace-Conn. transferred the stock of NMC to its parent Grace, thus  
15 making Grace-Conn. and NMC equal siblings subsidiaries of Grace;
- 16 • Grace then transferred the stock of Grace-Conn. to a newly formed  
17 subsidiary of Grace, Grace Holding Company, Inc.;
- 18 • Grace then spun off to its shareholders this brand new subsidiary Grace  
19 Holding Company, Inc. as a totally separate company. This left Grace with NMC as its sole  
20 asset;
- 21 • Grace (with its sole asset NMC) then merged with Fresenius Medical  
22 Care AG, a wholly owned subsidiary of Fresenius AG. This new entity was called Fresenius  
23 National Medical Care ("FNMC"). Grace's shareholders effectively received 44.8% of the  
24 stock of this new entity FNMC, and Grace ceased to exist; and
- 25 • Grace Holding Company, Inc. was renamed W.R. Grace & Co., a  
26 Delaware corporation.

27 52. The effect of this series of transactions is that Grace-Conn.—the entity  
28 with the asbestos liability and now renamed W.R. Grace & Co.—is totally stripped of and

1 segregated from its profitable former subsidiary NMC. The new W.R. Grace & Co. was left  
2 with full responsibility for satisfying Grace's asbestos liabilities, but was left undercapitalized  
3 and did not receive fair value for its now lost assets.

4 53. In the aforementioned Form S-4 regarding these 1996 transactions,  
5 Grace expressly recognized that the transactions may constitute a fraudulent transfer. In a  
6 section titled "Fraudulent Transfer and Related Considerations," Grace acknowledged its  
7 exposure when it stated:

8 "Under applicable law, the NMC Distribution would constitute  
9 a 'fraudulent transfer' if (a) New Grace or Grace Chemicals is  
10 insolvent, (b) the effect of the NMC Distribution would render  
11 New Grace or Grace Chemicals insolvent, (c) the NMC  
12 Distribution would leave New Grace or Grace Chemicals  
13 unreasonably small capital, or (d) New Grace or Grace  
14 Chemicals intended to incur, or believed it would incur, debts  
15 beyond its ability to pay as such debts mature. . . . Grace  
16 believes that, based on the factors considered in connection with  
17 the NMC Distribution, the NMC Distribution will not be a  
18 fraudulent transfer and will be made out of surplus in  
19 accordance with applicable law. There is no certainty, however,  
20 that a court would reach the same conclusion in determining that  
21 New Grace and Grace Chemicals have satisfied the applicable  
22 standards. In this regard, it should be noted that Grace  
23 Chemicals has had, and is expected to continue to have,  
24 significant liabilities arising out of asbestos-related litigation and  
25 claims. . . . If, in a lawsuit filed by an unpaid creditor or a  
26 representative of unpaid creditors or a trustee in bankruptcy, a  
27 court were to find that, at the time the NMC Distribution was  
28 consummated or after giving effect thereto, either New Grace or

1 Grace Chemicals, as the case may be, (a) was insolvent, (b) was  
2 rendered insolvent by reason of the NMC Distribution, (c) was  
3 engaged in a business or transaction for which its remaining  
4 assets constituted unreasonably small capital, or (d) intended to  
5 incur, or believed it would incur, debts beyond its ability to pay  
6 as such debts matured, then such court might require FNMC or  
7 NMC to fund certain liabilities of New Grace or Grace  
8 Chemicals, as the case may be, for the benefit of New Grace's  
9 or Grace Chemicals' creditors. The same consequences would  
10 also apply were a court to find that the NMC Distribution was  
11 not made out of the surplus of Grace Chemicals."

12 54. As Grace fully expected and knew, the 1996 "NMC Distribution"  
13 rendered Grace insolvent and with unreasonably small capital reserves. Grace intended and  
14 believed that following and as a result of the NMC Distribution transactions it would have  
15 debts beyond its ability to pay such debts as they matured.

16 B. The 1998 Fraudulent Transfer.

17 55. In August 1997, Grace—now consisting of a the pared down former  
18 W.R. Grace-Conn.—entered into an agreement with Sealed Air to effect another fraudulent  
19 conveyance transaction structured almost identically to Grace's 1996 fraudulent conveyance  
20 transactions involving Fresenius. This time Grace stripped out and segregated its packaging  
21 business from its chemical subsidiary's asbestos liability, thus further leaving Grace without  
22 sufficient capital to pay its asbestos victims and creditors.

23 56. Once again, Grace engaged its cohorts First Boston and Merrill Lynch  
24 to act as its financial advisors in connection with Grace's exploration of how to strip out and  
25 segregate its packaging business and other good assets from Grace's specialty chemicals  
26 business and asbestos exposure, thus leaving Grace without sufficient capital to pay its  
27 asbestos victims and creditors.

28 57. First Boston and Merrill Lynch counseled, advised, guided, schemed,

1 conspired, and strategized with Grace to accomplish this goal. First Boston and Merrill  
2 Lynch advised Grace about the structure and terms of the 1998 transactions. They opined that  
3 the transactions were fair from a financial point of view—but again expressly assumed with  
4 Grace's consent that the transactions did not constitute a fraudulent transfer. Grace paid each  
5 of First Boston and Merrill Lynch at least \$7.5 million and perhaps as much as \$17.5 million  
6 in connection with their work on this transaction.

7 58. Briefly stated, the March 1998 transactions unfolded as follows.

- 8 • Before the transactions, Grace consisted of a specialty chemicals  
9 business and a packaging business;
- 10 • Grace separated its specialty chemicals business and a packaging  
11 business into two separate subsidiaries;
- 12 • Grace then transferred the stock of Grace-Conn. (the specialty  
13 chemicals company) to a newly formed subsidiary of Grace, Grace Specialty Chemicals, Inc.;
- 14 • Grace then spun off to its shareholders this brand new subsidiary Grace  
15 Specialty Chemicals as a totally separate company. This left Grace with its packaging  
16 business as its sole asset;
- 17 • Grace (with its sole asset the packaging company) then merged with  
18 and into Sealed Air Corporation, a company outside the Grace family of companies; and
- 19 • Grace's shareholders effectively receive 63% of the stock of Sealed Air  
20 Corporation.

21 59. The result of these transaction is that Grace is totally stripped of and  
22 segregated from its profitable formerly affiliated packaging business. The new W.R. Grace &  
23 Co. is left with full responsibility for satisfying Grace's asbestos liabilities, but was left  
24 undercapitalized and did not receive fair value for its now lost assets.

25 60. In another Form S-4 filing with the SEC, Grace acknowledged—as it  
26 had with regard to its September 1996 series of transactions—that its March 1998 series of  
27 transactions may constitute a fraudulent transfer:

1 "Claimants may also bring suit seeking recovery from New  
2 Sealed Air or its subsidiaries by claiming that the transfers of  
3 assets and liabilities in connection with the reorganization of  
4 Grace, including the separation of Grace's packaging and  
5 specialty chemicals businesses and the cash transfer to and spin-  
6 off of New Grace, were 'fraudulent transfers.' A transfer would  
7 be a fraudulent transfer if the transferor received less than  
8 reasonably equivalent value and the transferor was insolvent at  
9 the time of the transfer, was rendered insolvent by the transfer  
10 or was left with unreasonably small capital to engage in its  
11 business. A transfer may also be a fraudulent transfer if it was  
12 made to hinder, delay or defraud creditors. If any transfers in  
13 connection with the reorganization of Grace are found to be  
14 fraudulent transfers, the recipient (including New Sealed Air  
15 and its subsidiaries) might be required to return the property to  
16 the transferor."

17 61. Grace represented that the newly formed W.R. Grace & Co. would be  
18 adequately capitalized and purported to believe that the transfers effected in the 1998  
19 transactions were not fraudulent. Grace admitted, however, in its SEC filing that "a court  
20 applying the relevant legal standards may not reach the same conclusions."

21 62. As a result of the 1996 and 1998 fraudulent transfer transactions, the  
22 so-called W.R. Grace & Co. entity left with the asbestos liability is a mere shadow of its  
23 former self. Virtually all of its valuable assets had been transferred away from the asbestos  
24 liabilities. The asbestos liabilities facing Grace far exceed Grace's fraudulently diminished  
25 worth.

26 63. As of 1996, Grace was aware that it faced tremendous exposure in the  
27 asbestos litigation against it. Its aggregate accrual for asbestos liabilities at December 31,  
28 1996, was reported by the firm to be \$994.1 million. This amount includes all pending

1 personal injury and property damage claims as well as personal injury claims expected to be  
2 filed through 2001.

3 64. This exposure has only increased over time. According to its Form 10-  
4 K filed with the SEC on March 28, 2000, as of December 31, 1999, W.R. Grace &  
5 Company was a defendant in approximately 50,342 asbestos related lawsuits, involving  
6 105,670 claims for personal injury. This number represented an increase over its exposure at  
7 the end of 1998, when 45,086 lawsuits involving 97,017 claims for personal injury were  
8 pending.

9 65. In that same Form 10-K, Grace noted that judgments had been entered  
10 against it in seven cases for a total of \$60.3 million and that it had settled 203 cases for a total  
11 of \$603.8 million. Grace estimated that its gross aggregate accrual for asbestos liabilities as  
12 of December 21, 1999 was \$1.084 billion. That figure did not take into account a national  
13 class action filed against it in federal district court of Massachusetts in February of 2000 on  
14 behalf of all owners of homes containing Grace's Zonolite attic fill insulation.

15 66. At all times mentioned herein, Defendants knew of Grace's massive  
16 asbestos liability and the experiences of other asbestos manufacturers mentioned above. With  
17 intent to defraud contingent creditors such as the Plaintiffs and the Class, Defendants  
18 intentionally, willfully, maliciously and fraudulently did the things herein alleged to defraud  
19 and oppress the Plaintiffs and the Class.

20  
21 **FIRST CAUSE OF ACTION**

22 **(For Fraudulent Conveyance In Violation Of The Uniform**  
23 **Fraudulent Transfer Act And The Common Law Of Fraudulent Conveyance)**

24 67. The Plaintiffs refer to and incorporate by reference all preceding  
25 paragraphs as if fully set forth herein.

26 68. At all times as herein alleged, the Plaintiffs and Class Members were  
27 creditors under the Uniform Fraudulent Transfer Act against a debtor, Grace, for their  
28 contingent claims arising from their injuries suffered due to asbestos exposure. No part of

1 the aforementioned claims have matured because these tort claims are pending and  
2 contingent.

3           69. The distribution of assets from Grace to FNMC and Sealed Air  
4 respectively were fraudulent transfers. The transfers were made with the intent to hinder the  
5 Plaintiffs' and the Class' ability to recover. Grace did not receive reasonably equivalent value  
6 for the transferred assets. Indeed, Grace's remaining assets after the transfers were  
7 unreasonably small. As a result of the transfers, Grace was rendered insolvent and unable to  
8 pay its debts as they matured. Grace transferred its assets with the intent and belief that the  
9 transfers would deprive the Plaintiffs and Class Members of recovery for their asbestos  
10 claims.

11           70. Defendants acted intentionally, fraudulently, maliciously, and without  
12 regard for the legitimate rights of the Plaintiff and the Class Members and thus they are  
13 entitled to exemplary damages.

14           71. Knowing of the contingent tort liability faced by Grace, transferees as  
15 herein described did not accept the transfer of assets in good faith.

16           72. At the time it made these transfers of assets herein described, Grace  
17 and each of the Defendants had actual intent to hinder and defraud Plaintiffs' and the Class'  
18 collection of their contingent claims against Grace. Defendants possessed such knowledge by  
19 virtue of their long history of dealing with asbestos litigation and knowledge of Grace's  
20 massive future asbestos liability.

21  
22 **SECOND CAUSE OF ACTION**

23 **(Common Law Conspiracy)**

24           73. Plaintiffs refer to and incorporate by reference all preceding paragraphs  
25 as if fully set forth herein.

26           74. Grace made the transfer of assets as herein described with the intent to  
27 defraud Plaintiffs and the Class.  
28

1           75. Defendants and each of them knowingly participated in the unlawful  
2 plan herein described and agreed to aid Grace to carry out its fraudulent conveyances.

3           76. Each of the Defendants had knowledge of the conspiracy and its  
4 unlawful purpose.

5           77. As alleged herein, Defendants agreed and knowingly and willfully  
6 conspired among themselves to defraud plaintiffs in the collection of their claims against  
7 Grace arising from its contingent asbestos liability.

8           78. Under this conspiracy, the Defendants agreed that Grace would  
9 fraudulently transfer assets to themselves as more fully detailed above.

10           79. Each of the Defendants did the acts and things herein pursuant to, and  
11 in furtherance of, the conspiracy and agreement alleged herein.

12           80. As a proximate result of the wrongful acts herein alleged, Plaintiffs and  
13 the Class have been damaged.

14           81. At all times mentioned herein, Defendants knew of Grace's massive  
15 asbestos liability and the experiences of other asbestos manufacturers. With intent to defraud  
16 contingent creditors such as the Plaintiffs and the Class, Defendants intentionally, willfully,  
17 maliciously and fraudulently did the things herein alleged to defraud and oppress the  
18 Plaintiffs and the Class. Plaintiffs and the Class are therefore entitled to award of punitive  
19 damages.

20  
21                                   **THIRD CAUSE OF ACTION**

22                                   **(Cal.Bus. & Prof. Code §17200 *et seq.*)**

23                                   **(Brought By Plaintiff Gill, Abner, And Mesquita In**  
24                                   **A Representative Capacity Against All Defendants)**

25           82. The Plaintiffs Gill, Abner, and Mesquita re-allege and incorporate by  
26 reference each and every allegation set forth in the aforementioned paragraphs.

27           83. Plaintiffs Gill, Abner, and Mesquita are suing in their individual  
28 capacity and on behalf of the California general public.

1           84.     Section 17200 of the California Business & Professions Code prohibits  
2 unfair competition, which is defined as any unlawful, unfair or fraudulent business act or  
3 practice.

4           85.     Beginning at a date unknown to the Plaintiffs Gill, Abner, and  
5 Mesquita, but at least as early as November 14, 1996, Defendants committed and continue to  
6 commit acts of unfair competition, as defined by Section 17200 *et seq.* of the Business and  
7 Professions Code, by, among other things, engaging in the acts and practices described  
8 herein.

9           86.     Defendants engaged in unfair competition in violation of Cal.Bus. &  
10 Prof. Code §17200 *et seq.* by violating, *inter alia*, each of the following, each of which  
11 constitutes an independent and separate violation of Cal.Bus. & Prof. Code §17200 *et seq.*:

- 12                 a.     The Uniform Fraudulent Transfers Act;
- 13                 b.     The Common Law of Fraudulent Conveyance;
- 14                 c.     The California Fraudulent Transfers Act, *inter alia*, Cal. Civil  
15                         Code Sections 3439.04 and 3439.05;
- 16                 d.     The common law of civil conspiracy;

17           87.     Defendants' conduct of, *inter alia*, spinning off its profitable divisions  
18 in an effort to avoid future asbestos liability as more fully described herein, was both  
19 substantially injurious to Plaintiffs and the Class and likely to mislead the general public, and  
20 consequently, constitutes both an unfair and fraudulent business act or practice within the  
21 meaning of Cal.Bus. & Prof. Code Section 17200.

22           88.     Defendants acts herein described resulted in harm to California  
23 Plaintiffs and the Plaintiffs Gill, Abner, and Mesquita and that harm outweighs the utility, if  
24 any, of Defendants' policy/practices. Accordingly, Defendants' actions described herein  
25 constitute an unfair business practice or act within the meaning of Business and Professions  
26 Code §17200.

27           89.     Defendants' conduct described herein violates the policy or spirit of the  
28 Uniform Fraudulent Transfers Act, the California Fraudulent Transfers Act, and/or the

1 California common law of civil conspiracy and/or otherwise significantly threatens or harms  
 2 competition or the general public, and therefore constitutes a violation of Cal. Bus. & Prof.  
 3 Code Section 17200.

4 90. The unlawful, unfair, and fraudulent business practices and acts of  
 5 Defendants, and each of them, as described above, have injured members of the Plaintiffs  
 6 Gill, Abner, and Mesquita in that Defendants have fraudulently transferred valuable assets  
 7 out of Grace and into other entities in an effort to fraudulently manipulate Grace's corporate  
 8 form in order to deprive the Plaintiffs and others of their proper remedies.

9 91. Plaintiffs Gill, Abner, and Mesquita, individually, and on behalf of the  
 10 themselves seek injunctive relief to create a trust or other equitable remedy and any order and  
 11 judgment of this Court as may be necessary to restore the benefits to themselves and the  
 12 California general public of all property acquired by Defendants by means of such unlawful,  
 13 unfair, and/or fraudulent business acts and practices as described herein. Plaintiffs and other  
 14 members of the general public have no other adequate remedy of law.

15 92. As a direct and proximate result of the aforementioned acts, Defendants  
 16 received and continue to hold ill-gotten gains belonging to Plaintiffs and members of the  
 17 California general public.

#### 18 PRAYER FOR RELIEF

19 WHEREFORE, Plaintiffs, individually and on behalf of the Class they  
 20 represent pray for judgment as follows:

21 1. For the First and Second Causes of Action:

- 22 a. A determination that this action may proceed and be
- 23 maintained as a national class action;
- 24 b. An Order requiring each defendant to account for all
- 25 transfers of the assets of the former W.R. Grace & Co. (and
- 26 any proceeds from the distribution of such assets) and all
- 27 receipt of fees in connection with the 1996 and 1998
- 28 transactions;

- c. A declaration that the 1996 and 1998 transactions constitute fraudulent transfers;
- d. The establishment of a constructive trust on all assets transferred in connection with the 1996 and 1998 transactions, and all fees received in connection with those transactions;
- e. A determination that Defendants be held jointly and severally responsible for damages equal to the full fair market value of all assets transferred in connection with the 1996 and 1998 transactions, and all fees received in connection with those transactions; and
- f. A determination that Defendants be held liable for actual and exemplary damages.

2. For the Third Cause of Action:

- a. An Order requiring each defendant to account for all transfers of the assets of the former W.R. Grace & Co. (and any proceeds from the distribution of such assets) and all receipt of fees in connection with the 1996 and 1998 transactions;
- b. A declaration that the 1996 and 1998 transactions constitute fraudulent transfers;
- c. The establishment of a constructive trust on all assets transferred in connection with the 1996 and 1998 transactions, and all fees received in connection with those transactions;
- d. Pursuant to Business and Professions Code Section 17203 and pursuant to the equitable powers of this Court, that Defendants be ordered to restore to the general public all

funds acquired by means of any act or practice declared by this Court to be unlawful or fraudulent or to constitute unfair competition under Cal.Bus. & Prof. Code Section 17200;

e. An attachment or other provisional remedy against the assets transferred and their proceeds;

f. An injunction against further disposition by the Defendants or the assets transferred and their proceeds; and

g. Any other relief the circumstances require.

3. A determination that Defendants be held liable for pre- and post-judgment interest at the highest legal rate;

4. A determination that the Defendants are held liable for costs of court and reasonable attorneys' fees pursuant to Code of Civil Procedure Section 1021.5; and

5. For such other and further relief as the Court may deem necessary and proper.

#### JURY TRIAL DEMAND

Plaintiffs hereby demand a trial by jury for all issues so triable.

Dated: November 22, 2000

Respectfully submitted,



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